No. 14,523

United States Court of Appeals

For the Ninth Circuit

TRANS WORLD AIRLINES, INC.,
a corporation,
Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, et al.,
Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

The City's brief submits a number of separate propositions, but all are directed to one or the other of two conclusions, (1) that the agreement in suit is ineffective *as a matter of law*[1] because the City is legally obliged to fix its charges to the airlines for common use facilities at the airport as public utility rates, and (2) that *as a matter of contract* the TWA agreement incorporates whatever rate schedules the municipal Public Utilities Commission may from time to time adopt.

The City asserts the foregoing conclusions in the face of the authorities cited in appellant's opening brief, which

[1]All emphasis in this brief is ours unless otherwise noted.

demonstrate their invalidity. Therefore, before answering the separate arguments made by the City, we wish briefly to review controlling principles set forth in our opening brief which the City either ignores or inadequately tries to explain away.

I.

THE CITY'S BRIEF DOES NOT MEET THE POINTS FOR REVERSAL MADE IN APPELLANT'S OPENING BRIEF.

The City's arguments except for the one point involving the contract language (answered infra 14-17) start always from the assumption that the City is operating a public utility, which it sometimes describes as "the airport" and sometimes as "the common use facilities at the airport" (e.g., City's Brief, pp. 3, 7). This assumption of a public utility relationship between the City and the airlines if justified (which we do not concede) would be irrelevant. *If the City had statutory authority to make the contract in suit, the contract is binding whether the case involves a public utility relationship or not.* The question in this case is not whether the airport is a public utility, but whether the City had lawful authority to make the contract.

The City does not, and under the statutory language could not, deny that the state statute, the Municipal and County Airport Law (quoted in the appendix to Appellant's Opening Brief) expressly grants authority to lease and contract as to airport lands, building space *and facilities.* The City, however, claims that this statute is inapplicable because the case concerns a "municipal affair."

If this were true, the contract would still be valid, because the charter and the home-rule powers of the City would, if material, give contracting authority (Appellant's Opening Brief, pp. 25-31). Still further, the contracting power is implicit in the City's authority to operate the airport, for which proposition the decision of this court in *Femmer v. City of Juneau* (1938) 97 F.2d 649, 652, is directly in point. *The contract is, therefore, valid whether the case involves a public utility or not, or involves a "municipal affair" or not.*

Actually, the case does not involve a municipal affair, and since the City rests its denial of the contracting power wholly on the municipal affair point, its case falls with its first premise, regardless of other controlling points for reversal made in appellant's opening brief. "Municipal affair," in the sense material to the case at bar, is a technical term, marking the line under the California Constitution between matters governed by general state statute and matters controlled by municipal charters. Regulation, under governmental powers of matters affecting state-wide, national and international carriers by air is certainly not a "municipal affair." This is clear, we submit, from cases cited in TWA's opening brief (p. 25), of which the City's brief offers no distinction. Since the TWA brief was filed the Supreme Court of California has reinforced the authority of these cases by its decision in *Pac. Tel. & Tel. Co. v. City of Los Angeles* (Apr. 15, 1955) 44 A.C. 299, 307, 282 P.2d 36 (quoted infra 6-7).

Since the City had contracting power and exercised that power in making the TWA contract, it is bound

by the contract, regardless of whether it had or has regulatory power also. This follows from the decision of this Court in the *Femmer* case sustaining a contract for use of a wharf, a municipally-owned facility, and pointing out the distinction between this type of contract and contracts which may be voidable by regulatory power (97 F.2d 654, quoted Appellant's Opening Brief, pp. 39-40). The same result follows from *Public Service Co. v. St. Cloud* (1924) 265 U.S. 352, and similar cases (Appellant's Opening Brief, pp. 33-37). The City distinguishes the *St. Cloud* case by claiming that the San Francisco *charter* gives the City no power to contract (Brief for Appellees, pp. 30-36). Since contracting power exists both by express provision of state statute regarding airport facilities, and because, under the *Femmer* case, such power is implicit in the City's statutory power to operate the airport (97 F.2d 652), the distinction fails, and the validity of the 1942 contract is established without regard to the contracting powers to be found in the charter and in principles of municipal home rule, if material (Appellant's Opening Brief, pp. 26-31).

In our opening brief we stated the foregoing and other separate and independent reasons why the decision of the District Court cannot be supported. The City, nevertheless, adopts the decision below without reservation as part of its brief to this court (Brief, p. 7), but does so without answering the decisive considerations for reversal. Without repeating all arguments made in the opening brief, we again point out:

The District Court did not mention the contracting authority granted by state law.

The court undertook to distinguish *Public Service Co. v. St. Cloud* (1924) 265 U.S. 352, and similar decisions of the Supreme Court, on grounds contrary to rulings of this Court in *Femmer v. City of Juneau* (9 Cir. 1938) 97 F.2d 649, 654 (Appellant's Opening Brief, pp. 38-41).

The court held the 1942 agreement partially *superseded* by the 1951 rate schedule, but did not mention the exception therein, "Except as otherwise provided, or amended by agreement" (Appellant's Opening Brief, pp. 12-13, 53-57).

While holding that the contract was "entirely valid when executed" (Tr. 176) the court held the contract partially superseded by rate regulation. It so decided in disregard and without mention of the cases holding that the court has no jurisdiction to hold even a voidable contract *superseded,* in the absence of a *prior and express* administrative finding that the contract is unreasonable and against public interest (authorities, infra 19-22, and Appellant's Opening Brief, pp. 54-57).

The City adequately answers none of the above considerations; several are passed without mention. Point after point in TWA's brief, including the unconstitutionality of the City's attempted action, is passed in the same way.

In the following pages are answered the points made in the City's brief, none of which, we submit, meet the case made in TWA's opening brief, or afford any support for the judgment appealed from.

II.

REGULATION OF THE USE OF COMMON FACILITIES AT THE SAN FRANCISCO INTERNATIONAL AIRPORT BY STATEWIDE, NATIONAL AND INTERNATIONAL AIRLINES IS NOT A "MUNICIPAL AFFAIR."

At page 25 of its opening brief TWA cited cases dealing with the Union Depot in Los Angeles, with operation of busses on the Venice freeway, and of carlines serving both city and outlying areas. Each case held that a municipal affair was not involved.

On April 15, 1955, after our former brief was filed, the Supreme Court of California decided another case to the same point, *Pac. Tel. & Tel. Co. v. City of Los Angeles,* 44 A.C. 299, 282 P.2d 36. This case involved several questions, but the matter specially material to the case at bar can be simply indicated. The City of Los Angeles claimed that its power over municipal affairs entitled it to determine whether a telephone company could engage in the telephone business within the territorial limits of that city. The Supreme Court of California, in overruling this contention, said (44 A.C. 307):

> "The business of supplying the people with telephone service is not a municipal affair; it is a matter of statewide concern. (See *Oro Elec. Corp. v. Railroad Com.,* 169 Cal. 466, 475-476 [147 P. 118]; *San Francisco v. Pacific Tel. & Tel. Co.,* 166 Cal. 244, 250-251 [135 P. 971]; *City of San Diego v. Southern Calif. Tel. Co.,* 92 Cal.App.2d 793, 800-801 [208 P.2d 27]; *People ex rel. Public Utilities Com. v. Mountain States Tel. & Tel. Co.,* 125 Colo. 167 [243 P.2d 397, 401].) Therefore, any delegation from the state to the city of authority to control the right of Pacific to do a telephone business should be clearly expressed, and any

doubt as to whether there has been such a delegation must be resolved in favor of the state. (See *Bay Cities Transit Co. v. Los Angeles,* 16 Cal.2d 772, 777 [108 P.2d 435]; *Oro Elec. Corp. v. Railroad Com.,* 169 Cal. 466, 477 [147 P. 118]; *City of Salinas v. Pacific Tel. & Tel. Co.,* 72 Cal.App.2d 494, 498-499 [164 P.2d 905].) We are unable to find any constitutional or statutory provision conferring this authority on the city."

The City offers no distinction of any of the cases cited by TWA on the municipal affair point, though the parallel with the present case is clear. The supplying of telephone service or the regulation of intercity transportation, bus operation on freeways, or grade crossings necessary to the operation of a union depot, are, by decision, not municipal affairs. Certainly then it is not a municipal affair to operate an international airport or to fix public utility rates for the use of necessary facilities by statewide, interstate and international airlines. Such activities are of the utmost importance both to the nation and the state, and by their nature cannot be municipal affairs.

In 1938 Congress passed the Civil Aeronautics Act under which the Civil Aeronautics Board exercises a broad national authority over aviation (52 Stat. 973, 49 U.S.C. 401, et seq.). In the field of state legislation are the Municipal and County Airport Law, quoted in the appendix to appellant's opening brief, and the State Aeronautics Commission Act. This latter provides a comprehensive plan for a state-wide system of airports, including those which are municipally owned (Cal. Stats. 1947, p. 2941, now secs. 21,001-21,694 of the Public Utilities Code). It is, we submit, inconceivable that these state statutes

can be rendered ineffective as to municipal airports, to which they expressly apply, on the ground that the operation of such airports is a municipal affair. And we again point out that contracting authority decisive of the present case is expressly granted to San Francisco by the Municipal and County Airport Law.

The fact that a matter of state or national importance is also of great local importance does not make it a municipal affair.

As was said in *City of Los Angeles v. Post War etc. Bd.* (1945) 26 Cal.2d 101, 114, 156 P.2d 746 (p. 114):

> "It is well settled * * * that where the project has a state purpose, it is immaterial that in other respects it is local in nature."

If there is doubt about the matter it must be resolved in favor of state authority, as held in the recent *Pacific Telephone* case, supra. Likewise in *Ex Parte Daniels* (1920) 183 Cal. 636, 639, 192 Pac. 442, where the court held that a state statute setting speed limits for city streets controls an inconsistent ordinance passed by a city with a freeholders' charter, it said (p. 639):

> "While it is true that the regulation of traffic upon a public street is of special interest to the people of a municipality, it does not follow that such regulation is a municipal affair, and if there is a doubt as to whether or not such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state. The rule is that—
>
> > 'Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.' "

So far as concerns the airport, the field of safety rules for planes using the landing strips and other facilities, has been largely filled by Federal authority.[2] However, the principle of the *Daniels* case is clearly applicable in the case at bar and shows, as do the other authorities cited, that this case does not involve a municipal affair.

The case of *Ebrite v. Crawford* (1932) 215 Cal. 724, 12 P.2d 937, is cited by the City in support of, but is actually opposed to, its municipal affairs argument (City's Brief, p. 23). That was a tort case involving an airplane collision at the Long Beach Airport. The plaintiff charged the defendant with negligence in having violated safety regulations promulgated by the city. No question of Federal regulation was involved. The defendant denied the authority of the city to make the regulations on the ground that the accident had occurred outside the city limits. Long Beach was a chartered city (Cal.Stats. 1921, p. 2054). *The court sustained the regulation not on the ground that it involved a municipal affair, but on the ground that the City was authorized to make it by the State Municipal and County Airport Law.* The Court said (p. 728):

> "This argument of appellant cannot be sustained for the reason that the city of Long Beach had extraterritorial power necessary to regulate and lay down rules governing the use of the municipally-

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[2]Included in the broad statutory authority of the Civil Aeronautics Board is the power to prescribe air traffic rules (49 U.S.C. 551 (7)). The Board has delegated this power to the Administrator of Civil Aeronautics (14 C.F.R. 26.26), who has promulgated comprehensive rules for airport traffic; concerning, for example, the manner in which aircraft shall taxi, take off and land, and the manner in which airport signals, communications, and control towers are to be operated (14 C.F.R. 617.1-617.30).

> owned airport, lying partly within and partly without the city. By act of the legislature approved April 28, 1927 (Stats. 1927, p. 485), California municipalities were authorized and empowered to purchase, lease or otherwise acquire lands for and to operate airports or flying fields and in connection therewith 'to provide rules and regulations covering the use of such airport and facilities and the use of other property or means of transportation within or over the said airport'."

None of the cases cited by the City support its municipal affair point. Except for *Ebrite v. Crawford,* supra, the question in these cases was whether public money could be spent for airport purposes. Illustrative is *Hesse v. Rath* (1928) 249 N.Y. 436, 164 N.E. 342, which was cited in *Krenwinkle v. City of Los Angeles* (1935) 4 Cal. 2d 611, 614, 51 P.2d 1098. The *Krenwinkle* case holds expressly that an airport "is a public enterprise"; that it serves a public purpose and can be built with public funds. But the City here contends something entirely different—airport operation is a "municipal affair"; therefore a specific contracting authority granted by state law with respect to airport facilities is ineffective. We know of no case anywhere which even remotely supports this contention.

III.

SECTION 19 OF ARTICLE XI OF THE STATE CONSTITUTION GIVES THE CITY NO POWER OF UTILITY RATE REGULATION MATERIAL TO THE CASE AT BAR.

The City's contention that section 19 of Article XI of the California Constitution gives it the rate regulatory authority here claimed (City's Brief, pp. 18-24) has no validity. It was not adopted by the trial court. It involves the same fallacies as underlie other parts of the City's argument; i.e., the unwarranted assumption that a public utility relationship is involved, and a complete disregard of the fact that the assumption, if valid, would be immaterial. If section 19 of Article XI gives a municipal power of rate regulation over charges for airport facilities (which it does not do), there is nevertheless a coexisting contracting power; the City actually exercised this contracting power in making the TWA agreement, and is therefore bound by that agreement (authorities, pp. 33-34, Appellant's Opening Brief). It is likewise immaterial whether regulatory power, if such exists, can be exercised beyond the territorial limits of the City. Whether it can or cannot, the contracting power exists also, and this power makes the contract valid.

While section 19 of Article XI is out of point for the reasons just given, it is also out of point because it has nothing to do with the airport, or attempted municipal rate regulation of its activities. The section reads as follows (italics as in the City's brief, p. 22):

> "Section 19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communica-

tion. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. *Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries;* provided, that it shall not furnish any service to the inhabitants or any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance. (Amendment adopted October 10, 1911.)"

The first italicized sentence does not deal with municipally owned utilities but **with privately owned utilities,** and the part of the sentence giving municipalities the right to regulate charges of privately owned utilities has been **superseded** by the transfer of this power to the state Public Utilities Commission (Cal.Const., Art. XII, sec. 23; see also Public Utilities Act of 1915, now contained in Public Utilities Code secs. 454, 455, 726, 728, 729, 730). The second sentence italicized by the City says nothing about rate regulation.

Further, the authorization to municipalities in section 19 to establish and operate public works (from which the City claims utility rate-making authority is to be implied) is not granted generally, but as to "public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of

communication''; i.e., specifically enumerated services. In the case of *In re Orosi Public Utility Dist.* (1925) 196 Cal. 43, 235 Pac. 1004, the Supreme Court of California said with regard to the 1911 amendment to section 19 of Article XI (p. 55):

> ''The adoption of the amendment definitely settled and removed all doubt from the question of the right of cities and towns to own and operate the kind of public utilities **designated by the constitution.**''

The City cannot bring the present case within the constitutional language as to ''transportation'' or ''means of communication.'' The latter term follows the specific term ''telephone service,'' and on the principle of *ejusdem generis* refers to communication similar to telephone service. As to this principle see *Fisher v. Los Angeles Pac. Co.* (1913) 21 Cal.App. 677, 680, 132 Pac. 767; *People v. McKean* (1925) 76 Cal.App. 114, 119-120, 243 Pac. 898). As to ''transportation,'' the City furnishes no transportation at the airport. Its operations there are not like a municipal water system or street railway, where the City performs the actual service to its inhabitants. To make an analogy the City would have to furnish air transportation by establishing municipal airlines.

All cases cited by the City for the proposition that municipalities have power under section 19 of Article XI to fix rates and charges of municipally owned utilities involved utility services expressly enumerated in that section, and so are not in point on matters involving the airport.[3]

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[3]*Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133, 102 P.2d 759, cited by the City (Brief, pp. 18-19) involved a **water**

We again submit, however, that the proper scope or construction of section 19 of Article XI is not involved in this case. Whatever it may be, the City still had the legal contracting authority which sustains the TWA contract.

IV.

THE CONTRACT DOES NOT PROVIDE THAT THE CHARGES IN SUIT ARE SUBJECT TO THE RATE SCHEDULES FROM TIME TO TIME ADOPTED BY THE CITY; TO THE CONTRARY IT SETS OUT SPECIFIC CHARGES (SUBJECT TO ESCALATION IN STATED INSTANCES) AND ESTABLISHES THESE SPECIFIC CHARGES AS A MATTER OF CONTRACT.

The City argues that the contract language incorporates by reference whatever charges for common use facilities the City may establish from time to time (City's Brief, pp. 5-6, 39-43). This argument is based upon a single clause in section 3 of the agreement saying that TWA shall have "the use" of such facilities "in common with others authorized so to do, and *on the same terms and conditions as apply to others*" (Tr. 18). This

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system. In referring to "public utility systems" the court necessarily meant systems supplying services enumerated in section 19 of Article XI. Its language, if given the all-inclusive meaning claimed by the City, would simply misstate the language of the Constitution.

Jochimsen v. City of Los Angeles (1921) 54 Cal. App. 715, 202 Pac. 902, and *City of Pasadena v. Railroad Commission* (1920) 183 Cal. 526, 192 Pac. 25, involved rates for municipal **water** utilities clearly within section 19 of Article XI. Although *Bowles v. City and County of San Francisco* (N.D.Cal. 1946) 64 F.Supp. 609, did not discuss section 19 of Article XI, it involved the municipal street railway of San Francisco, a **transportation** service. Although *Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 159 P. 2d 931, did not involve the power of the city to fix rates, it was concerned with a municipally owned **electric** utility.

language, however, clearly relates to **the use of, and not charges for,** the common facilities.

To begin with, the City's construction of the agreement is contrary to that made by the District Court, which held not that the charges for common use facilities are adjustable by the terms of the **contract,** but that the contract charges had been **superseded** by a public utility rate schedule, i.e., the schedule effective January 1, 1951.[4]

The meaning of the contract, read as a whole, is clear on the point under discussion. Neither in section 3 nor elsewhere does the agreement refer to rate schedules. The schedule which the Commission had adopted in 1941 (Tr. 207-209) was in effect when the agreement was made October 1, 1942, but the agreement does not mention it. Dollar and cents charges for common use facilities are set forth and are stated as a matter of contract (Tr. 20-22).

From beginning to end the parties speak in terms of contract, and nowhere in terms of rate regulation. Several provisions would be meaningless on the City's construction. Thus in section 3—the same section as that from which the City takes a clause out of context and on it founds the present point—there is a provision that

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[4]See Conclusions Nos. 8, 9, 10, 11, 14, Tr. 219-220; Opinion, Tr. 168, 177; Finding No. 18, Tr. 215-216; Judgment, Tr. 225. The point is illustrated by quoting Conclusion No. 8 (Tr. 219):

> "That the said schedule of rates and charges so adopted and approved supersedes rates and charges for common use facilities set forth in Section 3 of the lease and agreement of October 1, 1942, and plaintiff and cross-defendant is legally obligated to pay the rates and charges for the use of common use facilities set forth in said schedule of rates and charges, insofar as said rates and charges provide for rates for the use of common use facilities at the San Francisco Airport."

if more favorable "charges and fees" than the contract charges are granted to others, "then the fees and charges provided for herein shall be reduced to conform" (Tr. 22). Section 3 also contains a clause giving TWA the right to store aircraft in any hangar owned by the City "at the same rates as are charged * * * to other air transport operators" (Tr. 19); a meaningless provision if *everything* was to be at the same rates charged to other operators.

Section 24 provides that if a subsidiary or affiliated company of TWA should wish to lease available premises or facilities, the City will make a lease "upon the same terms, conditions, rentals *and fees* as provided herein" (Tr. 35). Here the parties were considering *both* charges and use, and covered both subjects specifically.

The City's contention also contradicts section 13 of the agreement. The City quotes this provision (Brief, p. 42) but offers nothing to explain away its obvious meaning. The section reads (Tr. 28-29):

> "Except as otherwise expressly provided for in this lease and agreement, no charges or fees of any kind shall be charged or imposed by Lessor, directly or indirectly, against Lessee or its employees, passengers, guests, vendors, patrons or invitees, for or on account of any of the rights or privileges granted to or to be enjoyed by Lessee, its employees, passengers, guests, vendors, patrons, and invitees, as provided in this lease and agreement."

While submitting for the above reasons that the agreement clearly does not incorporate rate schedules, present or future, we submit also that if the contract language could be considered doubtful, the doubt would be dis-

pelled by practical construction. The facts were summarized in our former brief (pp. 7-13), and need not be repeated.[5]

V.

PAGE BY PAGE REPLY TO THE CITY'S BRIEF.

Pages 2 and 3. Much of the material here mentioned was offered by the City in support of its contention that the contract had been invalidated by commercial frustration (Tr. 321, 342, 548). The trial court decided this point against the City and it is not urged on this appeal (see Tr. 178 and Appellant's Opening Brief, p. 6). As noted before, the contract provides escalation in charges for aircraft exceeding 25,500 pounds weight (Tr. 21).

Page 3. Here appears the first of the City's statements "that in the operation of *the airport* it is conducting a public utility." Sometimes the public utility is described as *"the common use facilities"* (City's Brief, pp. 7, 8). Without conceding such statements in either form (Appellant's Opening Brief, pp. 50-53), we submit again that they are not material. The City had statutory authority to make the contract in suit and is bound there-

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[5]Practical construction by the parties is entitled to great weight where the meaning of contract language can be considered doubtful (*Universal Sales Corp. v. Cal. Etc. Mfg. Co.* (1942) 20 Cal.2d 751, 761-762, 128 P.2d 665; *Roy v. Salisbury* (1942) 21 Cal.2d 176, 184, 130 P.2d 706. See also Appellant's Opening Brief, p. 33).

If evidence of the circumstances surrounding the execution of the contract could be considered, it is to the same effect, namely, that the clause in section 3 on which the City now relies refers to the use of the facilities and not to the charges for such use (see testimony of Henry G. Andrews, negotiator for TWA, Tr. 286, 288, 289, and of Bernard M. Doolin, Airport Manager, Tr. 308, 315).

by *regardless of whether or not there is a public utility relationship between the City and the airlines* (supra 2-4, and Appellant's Opening Brief, pp. 33-42). As to the City's statement that it must treat all users of the airport "on an equal basis," it does not do so. Only aircraft operators are subjected to rate regulation; other airport users, including those who use facilities in common, are not (Appellant's Opening Brief, pp. 12-13, 46-47, and see infra 19-22).

Pages 3-5. Here the City refers to the adoption of the so-called rate schedules. The 1941 schedule, as already shown, was in effect when the 1942 agreement was made between the City and TWA but not mentioned therein (supra 14-15). The 1946 schedule provided higher charges, but the City thereafter proceeded under the *contract* for four years and expressly and repeatedly reaffirmed its binding force (Appellant's Opening Brief, pp. 11-12). In 1947, and regardless of the schedule, the City made a contract of similar nature with United Air Lines (Tr. 393). In mentioning the 1951 schedule, which is claimed to supersede the contract, the City says nothing here or anywhere in its brief of the opening proviso, "Except as otherwise provided, or amended by agreement" (Tr. 55).

The City's statement that the schedules were "of rates and charges to be paid by aircraft lines *for use of common use facilities* at the San Francisco Airport" is not accurate. The schedules indiscriminately included charges for other facilities, including those which the City admits are not subjects of rate regulation (Tr. 242, 384-390, and see Appellant's Opening Brief, pp. 12, 13, 31-33).

Pages 6-7. Contrary to statements here made by the City, the TWA agreement does not give "preferential treatment" to TWA or result in "discrimination" against other airlines which do not hold similar contracts. The City did not plead discrimination and there is nothing about discrimination in the findings or decree.

The mere fact that the charges in the 1942 contract are less than those in the 1951 schedule has no legal significance. So, in *Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133, 102 P.2d 709 (a case cited in the City's brief on another point) the court upheld a difference in charges between customers of a municipally owned water company, saying (p. 138):

> "Lack of uniformity in the rate charges is not necessarily unlawful discrimination, and is not *prima-facie* unreasonable."

In *Live Oak W. U. Assn. v. Railroad Com.* (1923) 192 Cal. 132, 219 Pac. 65, the court sustained water rates fixed by the Commission which were different as between two classes of users. The court said (p. 143):

> "No design has been shown on the part of anyone to give any person an unlawful preference or unfair advantage over another or to indulge in an unlawful discrimination in any manner whatsoever. Not every discrimination or recognition of a ground of difference may be classified as unlawful. A discrimination based upon reason and justice can properly exist. The true principle which governs the instant case is correctly stated in *Pennsylvania R. R. Co. v. International Coal Mining Co.,* 230 U.S. 184 [Ann. Cas. 1915A, 315, 57 L. Ed. 1446, 33 Sup. Ct. Rep. 893, see, also, Rose's U. S. Notes]. In dealing with the rea-

> sonableness of rates and permissible discrimination based upon differences of conditions, it is there said: 'Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issue involves a comparison of rates with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon a difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts.' ''

In *Barringer & Co. v. United States* (1942) 319 U.S. 1, the Supreme Court upheld differences in freight charges made by a railroad, saying (p. 7):

> "It has long been established by our decisions that differences in competitive conditions may justify a relatively lower line-haul charge over one line than another, and that it is for the Commission, not the courts, to say whether those differences are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful."

A few of the many decisions throughout the country to the same effect are given in the note.[6]

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[6] *U.S. v. Wabash R. Co.* (1944) 321 U.S. 403, 411 ("Differences in conditions may justify differences in carrier rates or service"); *Texas & Pacific Ry. Co. v. U.S.* (1933) 289 U.S. 627 (Carriers' adjustment of rates to competitive conditions "does not amount to undue discrimination"); *Kiefer et al. v. City of Idaho Falls* (1930) 49 Idaho 458, 289 Pac. 81, 83 (citing *Live Oak W. U. Assn. v. Railroad Com.* (1923) 192 Cal. 132, 219 Pac. 65, supra, and saying, "Mere difference in the rates charged various classes

The foregoing cases establish another conclusive answer to the point under consideration, namely, that the trial court would have had **no jurisdiction** to find discrimination even if the City had pleaded it. The trial court held that the contract was "valid when executed" (Tr. 176), but voidable under the City's power of utility rate regulation, and actually avoided by the 1951 schedule (Tr. 224-225). While denying that the contract is voidable, we again point out that *if it were* it would nevertheless stand unless and until the **regulatory body**—not the court—made an express finding after hearing that the agreement is unreasonable and against public interest. That such finding by the Commission cannot be implied simply from adoption of a general rate schedule is established, we submit, by authorities cited in appellant's opening brief (pp. 55-57), of which the City makes no distinction. This matter goes to the **jurisdiction** of the District Court, as decided explicitly in the cases formerly cited, and also in the cases cited above in the present brief, including *Live Oak W. U. Assn. v. Railroad Com.* (1923) 192 Cal. 132, 219 Pac. 65, which quotes *Penna. R. R. Co. v. Inter-*

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of users is not sufficient to establish an unjustifiable discrimination"); *State v. Department of Public Service* (1939) 199 Wash. 24, 90 P.2d 243, 249 ("A mere difference in rates does not, of itself, constitute an unlawful discrimination"); *Illinois Cent. R. Co. v. Illinois Commerce Commission* (1935) 359 Ill. 563, 195 N.E. 32, 34 ("A mere difference in rates alone does not constitute undue discrimination"); *City of Pittsburgh v. Pennsylvania Public Utl. Com'n* (1951) 168 Pa.Super. 95, 78 Atl.2d 35; *Baltimore O.R. Co. v. Public Utility Commission* (1939) 135 Pa.Super. 20, 4 Atl. 2d 628; *Knotts v. Nollen* (1928) 206 Iowa 261, 218 N.W. 563; *Lewis v. Mayor and City Council of Cumberland* (1947) 189 Md. 58, 54 Atl.2d 319; *P. J. Ritter Co. v. Mayor of City of Bridgeton* (1946) 135 N.J.Law 22, 50 Atl. 2d 1; *Caldwell v. City of Abilene* (Tex.Civ.App. 1953) 260 S.W.2d 712, 714.

national Coal Co. (1913) 230 U.S. 184, and in *Barringer & Co. v. United States* (1942) 319 U.S. 1 (supra 19-20).[7]

Pages 7-8. The City's statement of the issues ignores points made in our opening brief, which, we submit, are controlling against the validity of the judgment.

Pages 8-9. The City having given as a main heading that the *common use facilities* are a public utility proceeds to support this claim with a subhead that the *airport* is a public utility. The charter provisions referred to are discussed in TWA's opening brief (pp. 46-53). We submit that they do not establish the airport as a public utility. If, however, this were debatable, there is certainly no language in the charter or elsewhere establishing that *certain airport facilities* such as landing strips, fueling equipment, lights, signals, etc., are a public utility, but that other airport facilities, including those used in common by patrons other than airlines, are not. But always beyond these considerations is the point that the contract in suit is binding under the City's lawful authority to make it, regardless of whether a public utility is here involved or not.

Pages 10-14. TWA does not contend that public utility status is determined by the number of patrons. The point

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[7]While TWA was under no obligation to meet a point of discrimination not raised by the pleadings or within the jurisdiction of the court, it may be noted that TWA was a pioneer at the San Francisco airport; that the City wanted it there to assure "continued use of the airport and the service to the City" (Airport Manager, Doolin, Tr. 315); and that the contract bound TWA to the airport for the stated period. These benefits are comparable to those to the City of Juneau mentioned by this court in sustaining the contract involved in the *Femmer* case.

actually made is stated at pages 48 and 49 of the opening brief.

Pages 14-17. The cases cited by the City as holding that airports are public utilities are not in point because in most of them the questions were such that it was unimportant for the court to distinguish between "public utility" and "public enterprise" or "public purpose."

Further, the recent decision of this court in *Air Transport Associates, Inc. v. U.S.* (9 Cir. 1955) 2 CCH Aviation Law Rep., p. 17,613, shows that the status of an airport must be determined by the state law which is properly applicable. Obviously outside state cases are not authoritative in the case at bar without a showing of similarity between their constitutional and statutory provisions and those of California. The City makes no such showing. To illustrate, it cites *Price v. Storms* (1942) 191 Okl. 410, 130 P.2d 523, where the court held a city empowered to issue bonds for a municipal airport under provisions of the Oklahoma Constitution granting powers to issue such bonds for "public utilities." But "public utility" under this constitutional provision, by express decisions of the Oklahoma courts, is synonymous with "public use" (99 Pac. 928) and "utilities" include convention halls, parks, cemeteries, fire and street-cleaning departments and a collection of American history and art.[8]

State v. Board of County Com'rs (1947) 149 Ohio St. 583, 79 N.E.2d 698, cited by the City to the point that

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[8]*Barnes v. Hill* (1909) 23 Okl. 207, 99 Pac. 927; *Denton v. City of Sapulpa* (1920) 78 Okl. 178, 189 Pac. 532; *Oklahoma City v. State* (1910) 28 Okl. 780, 115 Pac. 1108; *State v. Barnes* (1908) 22 Okl. 191, 97 Pac. 997; *City of Tulsa v. Williamson* (1954) 276 P.2d 209.

an airport is a public utility, is directly against the City's contention that operation of a municipal airport is a municipal affair. The court said (79 N.E.2d 702):

> "Aviation is a subject of state-wide concern and in exercising powers relating thereto counties act pursuant to authority delegated by the state."

Pages 18-21. As already shown, the City has no utility rate-making authority under section 19 of Article XI of the California Constitution (supra 11-14), nor under the charter provisions here cited (Appellant's Opening Brief, pp. 46-49). Again we submit, however, that the existence of rate-making authority is not material—if it exists the City's authority to contract coexists with it.

Pages 21-22. The validity of the TWA contract is not dependent upon any distinction between governmental and proprietary capacities. Even if the City has governmental power to regulate the charges in suit as public utility rates, the contract is still valid because the City had and exercised a co-existing statutory power to contract (Appellant's Opening Brief, pp. 33-38).

Pages 22-24. As already shown, neither section 19 of Article XI of the California Constitution nor section 130 of the charter gives the City the powers here claimed. It is therefore unnecessary for the court to consider how far the Constitution, charter, or other legal rules, might grant powers beyond municipal limits in cases to which they might properly apply. We submit, nevertheless, that in a correct view the extraterritorial powers of the City over the airport are proprietary and not governmental. The City's argument at this point is based on

section 19 of Article XI of the California Constitution which, for reasons already given, we submit has no bearing on the case at bar (supra 11-14).

Pages 24-29. The proposition, "Fixation of Rates by a Legislative Body Supersedes the Terms of a Contract" (City's Brief, p. 24) is so broadly stated as to be untrue. The whole point of the *St. Cloud, Femmer,* and other cases cited in TWA's opening brief (pp. 33-42) is that rate-fixing power **cannot** supersede a municipal contract which the City had statutory authority to make.

Pinney & Boyle Co. v. L. A. Gas etc. Corp. (1914) 168 Cal. 12, 141 Pac. 620, and all others but two of the cases here cited by the City were cited by the trial court and were distinguished in our opening brief (pp. 40-42). The two cases now added, namely, *Market St. Ry. Co. v. Pacific Gas & Electric Co.* (N.D.Cal. 1925) 6 F.2d 633, and *Sutter Butte Canal Co. v. Railroad Com.* (1927) 202 Cal. 179, 259 Pac. 937, are of the same character and subject to the same distinction (Appellant's Opening Brief, pp. 39-40).

Pages 30-36. The City distinguishes *Public Service Co. v. St. Cloud* (1924) 265 U.S. 352, by saying that St. Cloud had contracting power by its charter and San Francisco no such charter power (City's Brief, pp. 30-31). But San Francisco has explicit contracting power by state statute, to which the City's brief does not refer. It has contracting power incident to its authority to manage and operate the airport (*Femmer v. City of Juneau* (9 Cir. 1938) 97 F.2d 649), again a matter to which the City's brief does not refer. Further, if the charter provisions or principles

of municipal home-rule were material, the City would have contracting power from that source also, as already shown (Appellant's Opening Brief, pp. 26-31).

The City next refers to *Home Telephone Co. v. Los Angeles* (1908) 211 U.S. 265. This case states the same rule as the *St. Cloud* case, i.e., that a city cannot supersede by rate regulation a contract which it had statutory authority to make. The rule was not applied because, as the court held, the City of Los Angeles under the California statutes and cases did not have statutory authority to contract over the subject matter presented. The case at bar involves on the question of contracting power two points which the *Home Telephone* case did not involve, (1) a provision of state law granting contracting authority over the exact subject matter of this suit, namely, the airport facilities, and (2) a different rule concerning the effect of charter provisions (if material). The *Home Telephone* case was decided before the 1914 amendment to the California Constitution, under which the City has complete power over a municipal affair unless the charter expressly withholds it (see authorities Appellant's Opening Brief, pp. 26-27). Therefore the *Home Telephone* case has no bearing on the contracting authority of the City in the case at bar. But the Supreme Court unequivocally states therein the proposition controlling in the case at bar—where contracting power exists (as here it does), the City is bound by its contract regardless of whether it might have proceeded by regulatory authority.

The City's next citation, *R. R. Comm'n v. Los Angeles R. Co.* (1929) 280 U.S. 145 (Brief, p. 34), is not in point; the ground of decision was that "the State never so em-

powered the city'' to establish streetcar rates by contract (280 U.S. 151, 152).

The City further says, ''Section 130 of the Charter of the City and County of San Francisco is a mandatory provision for fixing rates.'' As shown the charter is not the controlling instrument here. Further, the Supreme Court in a case involving almost identical charter language held that a provision that the City shall have power to regulate **does not mean that the City must regulate** (*Public Service Co. v. St. Cloud* (1924) 265 U.S. 352, quoted Appellant's Opening Brief, pp. 30-31).

The City next adopts the distinction of the *St. Cloud* case made by the trial court, a distinction contrary to *Femmer v. City of Juneau* (9 Cir. 1938) 97 F.2d 649, 654 (quoted Appellant's Opening Brief, pp. 39-46).

The City tries to distinguish the *Femmer* case on the ground that some charges, i.e., wharfage rates, were fixed by schedule. We submit that no distinction is shown because the contract which was sustained by this court provided the charges for calls at the wharf and gave the contracting steamship line priority over others in the use of the wharf (97 F.2d 651). In this regard it went beyond the contract in the case at bar which gives TWA no priority with regard to the common use facilities.

The City makes no reference to the fundamentally important ruling in the *Femmer* case that a contract for the use of a municipally owned facility is **not** subject to avoidance by regulatory power, though this point was made and stressed in the opening brief (pp. 38-41).

Pages 36-38. The City argues that TWA in invoking legal rules as to the effect of administrative construction

is trying to estop the City from its right to legislate. A glance at the quotations made by the City will show that its authorities do not support this contention; actually they do not mention administrative construction. The City's actions in so far as they bear on portions of the 1942 contract which may be of doubtful meaning are relevant as a practical construction by a party to that contract (authorities, supra 16-17). The City's actions bearing upon the meaning of doubtful provisions of the charter are relevant as acts of a governmental body charged with the administration of the charter (see authorities, Appellant's Opening Brief, p. 33).

Pages 39-43. As already shown the City's rate schedule is not incorporated into the TWA agreement as a matter of contract (supra 14-17).

Pages 43-46. This argument was not mentioned by the trial court, and involves a play on words, i.e., that the agreement is a *lease,* and therefore while valid as to hangars and shop space under section 93 of the charter, is invalid as to the facilities used in common by the airlines because under section 123 of the charter a *lease* of such facilities requires approval by vote of the people.

The argument is completely answered by the contracting authority granted the City by state statute. The Municipal and County Airport Law grants authority to operate the airport to which, under the ruling in the *Femmer* case, contracting authority is incident (97 F.2d 652). The same statute expressly grants authority both to lease and contract, and expressly as to airport facilities (see quotation, Appellant's Opening Brief, Appendix, pp. ii-vi). If, however, the charter had any rele-

vance in this matter, the City still would have no point. The 1942 agreement is a contract as well as a lease. The City so admitted in response to TWA's request for admissions in the trial court (Tr. 115). The trial court made an express finding that the parties "entered into a written contract and lease" (Tr. 201). The trial court said also that the *"contract"* was "entirely valid when executed" (Tr. 176), and the City repeats the same language in its brief (p. 24).

The authority for the agreement in suit is not dependent on section 93 of the charter. It exists by state law. If a municipal affair were involved, which is not the case, the contracting authority would exist under the comprehensive powers of San Francisco as a home-rule city (Appellant's Opening Brief, pp. 26-27).

In the *Femmer* case it was argued that the agreement between the City of Juneau and the steamship company was void because "not submitted to the electorate and approved by them." An Alaskan statute required such approval in the case of a sale, lease, exchange or other disposition of certain public property (97 F.2d 656). This court held that the agreement for use of the wharf—a municipally owned "common use facility"—was a contract rather than a "lease" within the meaning of this particular statute. The court said in part (97 F.2d 657):

> "Nor do we think that the Northland agreement effected a 'sale, lease, exchange or other disposition of property' within the meaning of subsection twentieth of section 2383. Of course, no serious contention could be made that the result of the transaction was a sale or exchange of the wharf or part thereof. However, it is argued that the agreement amounted to a

lease. With this contention we do not agree. Northland was not given a right to possession of the wharf or any part thereof but merely a permission to use it for a limited purpose—a purpose entirely consistent with its intended use.''

Pages 46-48. These pages contain the City's argument on the municipal affair point, which has been answered (supra 2-10).

Pages 48-54. The City here attributes to TWA an argument which TWA did not make, and then answers that argument with no reference to the point actually made. TWA raised no issue about the sufficiency of notice for the proceedings which resulted in the rate schedule of January 1, 1951. The point is that the adoption of that schedule had no possible effect on the TWA contract for two separate reasons, (1) the express exception contained in the schedule itself, and (2) the absence of any express finding by the Commission on the TWA contract (Appellant's Opening Brief, pp. 53-57). The pertinence of the first reason is self-evident. As to the second reason, it is settled by cases directly in point and unchallenged by the City that a contract valid when made, even if voidable by regulatory authority, is not avoided until the Commission makes an *express finding* that that particular contract is unreasonable. Such finding cannot be implied from a general rate schedule such as that of January 1, 1951 (authorities, Appellant's Opening Brief, pp. 54-57). The same cases and likewise cases cited earlier in this brief from the Supreme Court of the United States and the Supreme Court of California hold also

that, in the absence of such an administrative finding, the court **has no jurisdiction** to make an order superseding any part of the contract (supra 21-22).

CONCLUSION.

The fact that the agreement of October 1, 1942, is, as we submit, perfectly valid and binding, creates no impediment to the proper and efficient conduct of the airport. The law gives the City ample powers of management and these powers are strengthened, not hurt, by the contracting authority granted by law.

We again submit that the authority of the City to make the lease contract of October 1, 1942, is decisive of the case at bar. Since this authority exists it is immaterial whether the airport is a public utility or not; it is immaterial whether the case deals with a governmental or proprietary function; it is immaterial whether it deals with a municipal affair—though in a correct view of the case it does not involve a municipal affair and the City has no governmental authority over the subject matter of this suit.

In addition, there are the other independent and controlling points for reversal made in our opening brief and left unanswered by the City.

We submit that the judgment cannot be supported on the grounds relied on by the trial court or any of the additional grounds put forth in the City's brief, and that the judgment should be reversed with instructions to enter

a declaratory judgment sustaining the validity of the contract and its binding force for its full term.

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